

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA**

JOSEPH and RENNY FANGSRUD
VON ESCH,

Plaintiffs,

v.

ASSET SYSTEMS, INC., an Oregon
Corporation d/b/a in Washington as
ASSET SYSTEMS, pursuant to
Washington UBI No. 601474356,

Defendant.

NO. 3:16-cv-05842-BHS

**PLAINTIFFS' SUPPLEMENTAL
BRIEFING RE: DEFENDANT'S 28
U.S.C. § 1927 MOTION FOR FEES
AND COSTS**

PLAINTIFFS, through counsel, respectfully submit the following Supplemental Briefing. Plaintiffs respectfully request that this Court consider the one-day late filing due to counsels' excusable neglect.

I. INTRODUCTION

Plaintiffs are just one family out of millions in America who have faced issues of "surprise medical debt." Plaintiffs' case prompted Defendant to audit 2,500 other patient medical collection files, which the hospital then discharged. And, lawmakers recognize that medical billing and collection have serious problems, and have been working to reform how medical debt is collected and credit reported. This was not a frivolous case.

II. ARGUMENT

1. This Litigation Worked to Protect Thousands of Consumers.

A. Defendant's Executive Director Admits 2,500 Accounts were "Written Off" as a Result of this Lawsuit.

This case was the catalyst to protect 2,500 other patients. In response to a line of questioning concerning the number of bad accounts at issue in this case, and the actions she took to correct the problem, Mary Emerton, Defendant's Executive Director stated:

When I became aware ... **I looked for every account that Legacy had placed with us between 2013 and 2014 that could have been similarly situated.** And I personally caused more than **2500 accounts** to be placed on hold while Legacy reviewed the issue that they had, in terms of that issue with the contract...So I wanted to protect all of the consumers that may have been similarly in the same situation. So we put those accounts on hold. **And, ultimately, Legacy wrote off all of those accounts.**

See Mitchell declaration, **EXHIBIT 1**, Trial Transcript, Day 1, pp. 154 – 155, lines 25:23.

Emphasis added.

Regarding the admission that 2,500 accounts were written off, Mary Emerton was asked: **"And it was plaintiffs' lawsuit that caused you to do that; wasn't it?"** See *id.* at pp. 155 – 156, lines 24 – 25. Emphasis added.

To this question, Mary Emerton responded:

No. Well, I suppose the plaintiffs' lawsuit caused Legacy to share what they thought the problem was. And when they shared what they thought the problem was, I took the best effort that I could to protect the consumers that may be in the same situation. I don't believe –

Id. at p. 156, lines 1 – 5. Emphasis added.

1 It is undisputed that this case involved a collection letter Defendant mailed to Plaintiffs,
 2 demanding over \$7,000.00, which Plaintiffs did not owe. If the balance of Plaintiffs' account
 3 is even remotely comparable to the balance of the other 2,500 accounts that were discharged as
 4 a direct result of Plaintiffs filing this lawsuit, then Plaintiffs' lawsuit provided relief to
 5 consumers in the seven-figure to eight-figure range.
 6

7 **B. On Appeal, Defendant's Own Attorney Admitted that Plaintiffs Sought**
 8 ***Reasonable Relief.***

9 It is undisputed that this case involved at least one *admitted* violation of a strict liability
 10 remedial statute that must be liberally construed to protect Plaintiffs. 15 U.S.C. § 1692 *et seq.*
 11 Defendant admitted mailing a collection letter demanding thousands of dollars Plaintiffs
 12 simply did not owe. The only question to be answered at trial was related to the statute's
 13 single affirmative defense; the Bona Fide Error defense. 15 U.S.C. § 1692k(c). In that regard,
 14 the trial hinged on whether Defendant could affirmatively prove the maintenance of procedures
 15 reasonably adapted to avoid the specific admitted statutory violations at issue in this case. *Id.*
 16

17 In general, Plaintiffs alleged that Defendant should have done more to investigate the
 18 account, including obtaining an Explanation of Benefits ("EOB") from Defendant's creditor
 19 client ("Legacy Salmon Creek Hospital"), before mailing the offending letter and taking other
 20 collection actions. Regarding this issue, at oral argument before the Ninth Circuit Court of
 21 Appeals, the Honorable Justice Fletcher posed the following question to defense counsel,
 22 Jeffrey Hasson: **"So the question is, cited by the other side, why is it not a reasonable**
 23 **procedure in that circumstance, to ask for the EOB?"** During the with Justice Fletcher that
 24 followed, defense counsel stated in pertinent part:
 25
 26

1 **That's one of the procedures they could have implemented.**
 2 **They didn't in this case. So, I can't just say that that's it.**
 3 **The question though is not whether or not the EOB was the**
 4 **right procedure to have in place, because clearly in this case,**
 if they had requested the EOB, it would have stopped back in
 January of 2016. I can't dispute that...

5 *See Joseph Fangsrud von Esch v. Asset, et al.*, Ninth Circuit Court of Appeals No. 19-35825,
 6 Audio of Oral Argument, minutes to 13:27 - 17:11, at:
 7 https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000017614.

8 It is undisputed that *all* of the statutory violations Plaintiffs alleged in this case occurred
 9 *after* January of 2016. Therefore, by defense counsel's own admissions to the Court of
 10 Appeals, the procedure Plaintiffs suggested was not only reasonable, but would have also
 11 prevented all of the statutory violations that occurred in this case.

12 The Ninth Circuit Panel that heard the first appeal in this case scheduled the matter for
 13 oral argument the second time around. It is hard to conceive that the Ninth Circuit Court of
 14 Appeals would hear oral argument twice in a frivolous lawsuit lacking any public importance.

15 **2. This Issue of Surprise Medical Debt Is Not Frivolous.**

16 State and Federal lawmakers worked hard to reform medical billing and medical debt
 17 collections and credit reporting during the pendency of this litigation. The Washington State
 18 Legislature amended Washington's Collection Agency Act to afford additional protections to
 19 consumers similar to Plaintiffs. *See* Mitchell decl., **EX. 2**, RCW 19.16.250(28) and (29);
 20 Medical Debt—Collection, 2019 c 227, 66th Washington State Legislature (2019).

21 Also, during the pendency of this litigation, the Washington State Attorney General
 22 entered into a consent decree with St. Joseph's Hospital in Tacoma, in a case involving
 23 surprise medical debt, erroneous medical billing, and medical debt collection. **EX. 3.**

1 In September of 2017, the three major credit reporting agencies changed their
 2 procedures to wait 180 days before reporting medical debts. *See*,
 3 <https://www.myfico.com/credit-education/blog/medical-collections-removed>. In 2019, the U.S.
 4 Congress considered legislation to require the credit reporting agencies to wait one year before
 5 reporting medical debt: Medical Debt Relief Act of 2019, S. 1581, 116th Cong. (2019 – 2020).
 6

7 The U.S. Congress has also considered legislation to stop "surprise medical debts" --
 8 Stopping the Outrageous Practice of Surprise Medical Bills Act of 2019, S.B. 1531, 116th
 9 Cong. (2019 – 2020). One can reasonably anticipate that, following the COVID-19 pandemic,
 10 this issue will be revisited.

11 Also during the pendency of this litigation, there were many, many lawsuits filed
 12 against hospitals for fraudulent debt collection. One example is: Methodist *Le*
 13 *Bonheur* Healthcare recently wrote off 8,300 debt collection lawsuits in Shelby County, TN.
 14 Mitchell decl., **EX. 4**. That case is just one of many similar actions taking place throughout the
 15 country.
 16

17 Additionally, both parties to the appeal filed National Amicus briefs, recognizing the
 18 importance of these issues. A frivolous lawsuit would not garner Amicus support.
 19

20 **3. Defendant Should Not be Awarded Fees or Costs.**

21 Given the above realities (and many more that were not included for purposes of
 22 brevity), it is difficult to imagine how Defendant could ask this Court to declare Defendant the
 23 substantially prevailing party for purposes of awarding costs. It is even more difficult to
 24 imagine how Defendant could justify overwhelming this Court with hundreds of pages of
 25 briefing and documents in support of the theory that Plaintiffs violated 28 U.S.C. § 1927.
 26

1 Stated simply, Defendant admitted its statutory violation. The Ninth Circuit endorsed a
 2 jury trial. The only question was whether Defendant could meet its affirmative defense of
 3 establishing reasonable procedures. During trial, Defendant finally admitted that this lawsuit
 4 saved 2,500 other consumers what likely amounts to millions of dollars. Despite these
 5 admissions, the Trial Court concluded as a matter of law that Defendant's procedures were
 6 reasonable. Then, on the second appeal, which the Ninth Circuit scheduled for the second oral
 7 argument, defense counsel admitted that Plaintiffs' position throughout this litigation was
 8 reasonable. *See Supra.*: "...clearly in this case, if they had requested the EOB, it would
 9 have stopped back in January of 2016. I can't dispute that..."
 10

11 The underlying statute contains a one-way fee-shifting provision that only inures to the
 12 benefit of a successful plaintiff. Therefore, despite the above realities, to offset the cost of the
 13 choice Defendant made to vigorously defend these admitted statutory violations, Defendant
 14 seeks to color this case as frivolous and deserving of 28 U.S.C. § 1927 sanctions. Given the
 15 above realities, nothing could be further from the truth.
 16

17 III. CONCLUSION

18 For the reasons stated above, this Court should deny Defendant's requested relief.

19 DATED THIS 14th day of January, 2021.

20 s//Robert Mitchell

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of January, 2021, the foregoing was filed via the Court's CM/ECF system, which will automatically serve and send email notification of such filing to all registered attorneys of record.

DATED THIS 14th day of January, 2021, at Memphis, Tennessee.

s//Robert Mitchell

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